Supreme Court, U.S.
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Docket No._____

OFFICE OF THE CLERK

In The
UNITED STATES SUPREME COURT
October Term, 2002

JESSIE D. MCDONALD, Pro se,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

Petition For Writ Of Certiorari
To The Tennessee Supreme Court

PETITION FOR WRIT OF CERTIORARI

Petitioner

Dr. Jessie D. McDonald, Ed. D.
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Nashville, Tennessee 37228
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19 pp

QUESTIONS PRESENTED

WHETHER THE STATE SUPREME COURT ABUSED ITS DISCRETION BY REFUSING TO WITHDRAW ITS OPINION THAT WAS WRONGFULLY ENTERED?

WHETHER THE TENNESSEE SUPREME COURT ABUSED IT'S DESCRETION BY DENYING THE MOTION TO RECALL ITS MANDATE?

WHETHER THE STATE'S STATUTE OF LIMITATION LAWS DEPRIVES A COURT OF JURISDICTION TO SET ASIDE A WRONGFUL CONVICTION THAT IS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

WHETHER THIS CONVICTION IS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS FOR EQUAL PROTECTION AND DUE PROCESS OF LAW?

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OPINIONS BELOW

This matter is being presented to this Court, as a result of the Tennessee Supreme Court denying:

(a) Motion to Withdraw Portions of the Record, and the Order was entered on December 4, 2002. [Appendix, P. 1]

(b) Order denying Motion to Recall its Mandate, which the court interpreted to be an application for Post Conviction Relief, on October 15, 2002. [Appendix, P. 2]

Motion to Reconsider was timely filed and the court denied the motion on November 4, 2002.

[Appendix, Page 3]

JURISDICTION

This Court has exclusive appellate jurisdiction over the Tennessee Supreme Court, based on the fact §39-1901,TCA is repugnant to the Fifth and Fourteenth Amendments to the United States Constitution, since the petitioner did not have proper notice of the judicial interpretation at the time of the trial and he was convicted of a crime that was not charged in the indictment, and there was no other forum available to defend against its meaning, and the state supreme court abused its discretion and refused to recall its mandate, or withdraw it from the record in this case.

The date the judgment or Order sought to be reviewed was entered on December 4, 2002. [Appendix, P.1]

The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the Order in question is , 28, §1257(a),USC.

Constitutional Provisions

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, . . . ; ... nor be deprived of life, liberty, or property, without due process of law; . . . [Emphasis added to pertinent section] Title 28 of USC, Constitution, Page___.

Fourteenth Amendment

...; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. [Emphasis added to pertinent section] Title 28 of USC, Constitution.

Tennessee Statute

§39-1901, TCA

" **39-1901. False pretense.** – Any person, who, by any false pretense, or by any false token or counterfeit letter, with intent to defraud another, obtains from any person any personal property, or the signature of any person to any written instrument, the false making of which is forgery, shall, on conviction, be punished as in case of larceny.

The words "false pretense" include all cases of pretended buying, borrowing, or hiring, bailment or deposit, and all cases of pretended ownership, where the person obtaining possession intended, at the time he received the property, feloniously to steal the same."

STATEMENT OF THE CASE

The federal questions were first raised in the state supreme court, which issued the aggrieved judgment, by Motion to Withdraw its judgment and Motion to Recall its Mandate, which were denied. [Appendix, Page 1, 2 & 3]

On May 9, 2002, the Tennessee Supreme Court notified the clerk of the court, not to accept any documents for filing, other than a Motion to Recall Mandate, related to a motion to withdrawing the record, or portions thereof. [Appendix, P. 4]

The petitioner filed his Motion to Recall Mandate, which was denied On October 15, 2002, because this case was over 28 years old. [Appendix, P. 2]

November 4, 2002, the state supreme court denied a motion to reconsider. [Appendix, P. 3]

December 4, 2002, the state supreme court denied the petitioner's motion to withdraw the final judgment of the state Supreme court, from the record in this case. [Appendix, P. 1]

It is from this Order this case is being presented to this Court for review.

ARGUMENT

The State Supreme court rendered a decision in direct conflict with a previous decision from theU.S. Court of Appeals for the Sixth Circuit and a judgment from this Court.

On May 9, 2000, the State Supreme Court issued an Order to the clerk of the court, not to accept any pleadings from McDonald, other than a Motion to Recall Mandate, those

relating to withdrawing portions of the record from the record. [Appendix, P.4] After Motions to Recall Mandate was filed, the court denied them, based on the fact, this case was over 28 years old and the judgment was final. [Appendix, P.2] The aggrieved judgment from the Tennessee Supreme Court created a conflict with a previous decision from the Sixth Circuit Court of Appeals, and one from this Court, on the same subject matter, which requires this Court to exercise its appellate jurisdiction to settle this issue. In case, *Rogers v. Howes,* Docket No. 96-1862, _____F.2d at _____, (6th. Cir.,1996), the court said: "when there is danger of a miscarriage of justice present, the amount of time from the date of the judgment, to the date of the date of the relief sought, is not a relevant issue, even after 25 years, once the defendant has exhausted his direct appeal. In the case at bar, the direct appeal was exhausted and a final judgment was entered on May 13, 1975 and a reversal of the conviction was entered, based on constitutional violations, which did not involve the constitutionality of the state statute

which the conviction was based on. However, the state supreme court granted a limited review to consider the constitutionality of §39-1901,TCA and in doing so, deprived McDonald of equal protection and due process under the Fourteenth Amendment to the United States Constitution. Under Tennessee law, where the question involving a state statute is a mere abstract, and not involved in any real controversy between the parties to the litigation, the constitutionality of a state statute will not be passed upon by the courts. *Gilbreath v. Gilliland*, 95 Tenn. 383, 32 S.W. 250 (1895); *State v. Duncan*, 1 Tenn. Ch. App. 334(1901); and *Gribble v. Wilson*, 101 Tenn. 612, 49 S.W. 736 (1899). The merits of the case did not involve the constitutionality of the state statute and it was improper for the state supreme court to render a decision on the constitutionality of §39-1901, since it did not affect the rights of the litigants and the interpretation had no relevance to the merits of the case. *Richardson v. Young*, 122 Tenn. 471, 125 S.W. 664 (1910); and *Allen & Bean, Inc. v. Miller*, 61 Tenn. App. 373, 454 S.W.

2d 367 (1970). The question involving the statute will be determined at the instance of a litigant whose success depends upon its constitutionality, and for such party is vitally interested in the question and clearly has a right to make it. *McCamey v. Cummings,* 130 Tenn. 494, 172 S.W. 311 (1914). The issues that were presented before the state supreme court in case *State v. McDonald,* 534 S.W. 2d at 650, did not affect the rights of either the State or McDonald and the state supreme court should have refrain and been reluctant to render the aggrieved judgment at issue. *Van Dyke v. Thompson,* 136, 189 S.W. 62 (1916) and when the state supreme court rendered the aggrieved judgment, caused the trial court to issue a void judgment of committal, confining McDonald in the Tennessee State Penitentiary to serve the three year sentence, which is a clear case of a miscarriage of justice for false imprisonment. It was not proper for the Tennessee Supreme Court to express an opinion on the constitutionality of §39-1901 TCA, when it appeared clearly by the record that there was no suit

legitimately before the court. *U.S. V. Stone,* 39 U.S. 524, 14 Pet. 524, 10 L.Ed. 572. Since this court has exclusive appellate jurisdiction over the state supreme court, the motion to recall mandate is subject to de novo review for clear error. *Clemmons v. Snowders*, 34 F. 3d 352, 354 (6th., Cir., 1994). Also, when the state supreme court reversed the judgment of the appellate court, McDonald did not have proper notice of the judgment to present a defense at the trial level, or on direct appeal. There has been no allegation that McDonald has defaulted his federal claims in state court, but even if a claim should arise, this court has previously stated that:

> "[i]n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson,* 501 U.S. 722 (1991)
>
> [Emphasis added to pertinent section]

Accordingly, there can be no dispute , McDonald did not have proper notice of the judicial interpretation of §39-1901 to defend against the statute at the time of the trial, nor on direct appeal and to refuse to recall the mandate will result in a miscarriage of justice.

CONCLUSIONS OF LAW

Consistent with 28, §1257(a), USCA, United States Supreme Court's jurisdiction to review state court's decision is generally limited to a final judgment rendered by highest court of state in which decision may be had. *Flynt v. Ohio*, (Ohio,1981), 101 S. Ct. 619, 68 L. Ed. 2d 489.

Respectfully submitted,

Jessie D. McDonald

Jessie D. McDonald, Ed. D.

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APPENDIX – "A"

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

JESSIE D. MCDONALD v. STATE OF TENNESSEE

Filed: Dec. 4, 2002
Clerk of the Courts

No. M2001-01251-SC-OT-CO

ORDER

On November 21, 2002, the pro se movant, Jessie D. McDonald, filed a "Motion to Withdraw Portions of the Record" seeking to withdraw this Court's judgment from the record of this case. After due consideration, the Court finds that the motion should be overruled.

Accordingly, it is therefore ORDERED that the motion is OVERRULED. Costs associated with this cause are taxed to the pro se movant, Jessie D. McDonald, for which execution may issue, if necessary.

PER CURIAM

APPENDIX "B"

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

JESSIE D. MCDONALD v. STATE OF TENNESSEE

Filed Oct. 15, 2002
Clerk of the Courts

No. M2001-01251-SC-OT-CO

ORDER

The pro se respondent, Jessie D. McDonald, has filed a "Motion to Recall Mandate" seeking to set aside a judgment of this Court rendered on January 19, 1976. In reality, the action filed by the respondent is a post-conviction attack on a conviction that has been final for over twenty-eight years. After due consideration, we find that the motion is without merit. Accordingly, the Motion to Recall mandate is denied. Costs associated with this cause are taxed to Jesse McDonald, for which execution may issue, if necessary.

PER CURIAM

APPENDIX "C"

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

JESSIE D. MCDONALD v. STATE OF TENNESSEE

Filed Nov. 4, 2002
Clerk of the Courts

No. M2001-01251-SC-OT-CO

ORDER

On October 29, 2002, the pro se movant, Jessie McDonald, filed "Motion to Reconsider". After due consideration, the Court finds that the motion should be denied.

Accordingly, it is ORDERED that the "Motion to Reconsider" is DENIED. Costs associated with this cause are taxed to the movant, Jessie D. McDonald, for which execution may issue, if necessary.

PER CURIAM

APPENDIX "D"

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

JESSIE D. MCDONALD v. STATE OF TENNESSEE

Notice Date: May 9, 2000, 2002
Clerk of the Courts

No. M2000-00491-SC-OT-CV

Notice: Attorney Notice-Mandate Issued Sent::
Trial Court: Davidson County Criminal Court
Trial Court No. B-317

Mandate issued on the above "notice date". The mandate consists of certified copies of the judgment, any order as to costs, and a copy of the opinion. The mandate in its entry is remitted to the trial court clerk and signifies the end of the case. The clerk's office will not accept any filing after issuance of mandate except those requesting recall of the mandate, those related to withdrawing the record or portions thereof related to the assessment of costs.

JRS

C: State Attorney General Paul G. Summers